SUPREME COURT, U.S.
FILED
NOV 2 \ 2004
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(12)

No. 03-388

In the Supreme Court of the United States

DENNIS BATES, ET AL.,

Petitioners,

vs.

DOW AGROSCIENCES LLC,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF BASF CORPORATION IN SUPPORT OF RESPONDENT DOW AGROSCIENCES LLC

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INTEREST OF *AMICUS CURIAE*[1]

BASF Corporation (BASF) is a major supplier of agricultural products, including herbicides, fungicides, and other crop protection pesticides, to the farming industry. As a manufacturer of crop protection pesticides, BASF is subject to the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y. BASF has an interest in any decision by this Court that could upset the comprehensive, carefully balanced federal/state regulatory scheme for pesticide labeling that Congress has established in FIFRA.

In addition, BASF now has pending before this Court a petition for a writ of *certiorari* that presents the issue of FIFRA preemption in a state consumer fraud class action. The Court's decision in this case may substantially affect BASF's pending case. *See BASF Corporation* v. *Peterson*, (petition for cert. filed July 16, 2004 (No. 04-81)). Indeed, given the breadth of Petitioners' attack on preemption, the decision may be dispositive of FIFRA preemption issues in *Peterson* and many other cases. BASF believes that it is

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[1] Pursuant to Sup. Ct. R. 37.6 ("Rule"), BASF states that no counsel for a party has authored this brief in whole or in part, and no person or entity other than BASF has made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37.3(a), BASF has obtained consent of the parties to the filing of this brief. The parties have mutually consented to the filing of amicus briefs, and that consent has been filed with the Court.

important for the Court, in considering Petitioners' arguments, to have before it information about the wide variety of state-law claims that may conflict with the federal regulatory regime governing pesticide labeling. As we discuss herein, the *Peterson* case itself is a good example of a state-law damages claim, outside the traditional product liability context, that undermines EPA's ability to achieve FIFRA's goals through control over pesticide labeling.

The rule for which Petitioners argue would threaten EPA's exclusive authority under FIFRA to regulate the content and format of the labels on the nation's pesticides. That authority includes a broad array of powers that can address any problems on pesticide labels. FIFRA empowers EPA to adopt specific regulations mandating appropriate labels. If a pesticide manufacturer makes an error on a label, FIFRA provides the means for EPA to correct it.[2] If a pesticide manufacturer acts improperly with respect to a label, FIFRA provides EPA with the power to impose an appropriate sanction.[3] This authority serves Congress's goal of nationally uniform pesticide labeling.

Subjecting EPA-approved pesticide labels to a nationwide patchwork of jury-imposed common law modifications would effectively frustrate that goal of nationally uniform labeling. Such a result would severely disrupt the American pesticide market, resulting in higher

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[2] *See* 7 U.S.C. § 136d(b) (EPA may cancel a pesticide registration).

[3] *See id.*; 7 U.S.C. § 136k (EPA may stop sales and/or seize any pesticide found to be in violation of FIFRA); 7 U.S.C. § 136l(a)(1) (EPA may assess a civil penalty to registrants who violated FIFRA up to $5,000 per offense).

prices, voluminous and inconsistent product labels, reduced availability, and generally less certainty in a market that depends heavily on continuity. Such a scenario ultimately benefits no one—not the pesticide manufacturer and certainly not the consumer.

Accordingly, BASF submits this *amicus curiae* brief in support of Appellant Dow Agrosciences, LLC and requests this Court affirm the court of appeals ruling below.

SUMMARY OF ARGUMENT

FIFRA preempts all state law label "requirements in addition to or different from" those imposed by federal law. Such "requirements" may consist not only of positively enacted, prospective state statutes and regulations, but also of state common-law actions and other retrospective measures that necessarily affect pesticide labels.

Petitioners' attempt to draw a bright line between prospective and retrospective state-law "requirements," and their contention that FIFRA covers only the former, runs counter to the plain intent of FIFRA, this Court's precedent, and the substantial body of consistent and well-reasoned authority developed in the wake of this Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). The key to preemption is not the form of the state action, but whether that action effectively "requires" a change in the federally-approved label. Contrary to Petitioners' assumption, the prospective or retrospective character of a state action neither dictates nor reveals whether it imposes such "requirements." Many state actions combine both prospective and retrospective elements. The bright-line test Petitioners urge thus is not tenable. Petitioners' argument would produce an anomalous result, where states are *not* permitted to establish by statute clear legislative requirements for pesticide labeling, but *are* permitted to impose *ad hoc*

labeling requirements through the back door by means of common law actions challenging those labels.

In addition, Petitioners' proposed bright-line test, with state regulations preempted on one side and state common-law actions permitted on the other, fails to account for the broad spectrum of approaches that states may take to addressing pesticide labels. From local regulations to state consumer fraud statutes, states take action in a number of ways that defy simple classification as prospective or retrospective, or as regulatory or common law. An approach based on such insubstantial distinctions threatens to turn FIFRA preemption into a mere pleading game in which attorneys will advance increasingly "creative" arguments to circumvent EPA's exclusive authority to regulate the scope and content of pesticide labeling, to the detriment of the environment, the nation's food supply, and farmers.

ARGUMENT

I. FIFRA'S EXPRESS PREEMPTION CLAUSE BARS STATES FROM IMPOSING "ANY REQUIREMENTS" FOR PESTICIDE LABELING "IN ADDITION TO OR DIFFERENT FROM" THOSE IMPOSED UNDER FIFRA, REGARDLESS OF THE SOURCE OF THE REQUIREMENT.

Petitioners expend a substantial portion of their brief to this Court trying to read the preemptive "requirements" language of FIFRA to contemplate, indeed to compel, two different classes of state control of pesticide labels: prospective regulation and retrospective regulation. Petitioners' Br. at 16-28. The relevant language of FIFRA provides:

> § 136v Authority of States
>
> (a) In general
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Uniformity
>
> *Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.*

7 U.S.C. § 136v(a) & (b) (emphasis added).

Petitioners ask the Court to construe this language as prohibiting one form of state intervention in labeling while permitting another. Although Petitioners' brief frames the issue in terms of regulations versus common law actions, Petitioners' Br. at 16-28, the distinction in analytical terms is really between prospective regulation of pesticide labels and retrospective regulation of those labels. Prospective regulation (which Petitioners concede is preempted by FIFRA, Summary of Argument, Petitioners' Br. at 14) looks forward and tells a pesticide manufacturer that, in the future, it must label its pesticide in a particular way or cannot label it in another. Such prospective regulation most often appears in the form of state statutes or regulations, but also includes other forward-looking state actions such as injunctions. *Cf., e.g., Lacey v. Lorillard Tobacco Co., Inc.*, 956 F. Supp. 956, 963-64 (N.D. Ala. 1997) (plaintiffs sought injunction requiring defendants to disclose an additional statement related to smoking and health not required by the Cigarette Labeling Act).

Retrospective regulation, in contrast, looks backward. Retrospective regulation tells a pesticide manufacturer—after the fact—that it should not have labeled its pesticide in the

way it did. Although common-law actions are perhaps the most common form of retrospective regulation in this context, there are others, as discussed below.

However the argument is framed, this Court has rejected the very distinction Petitioners urge. In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992), this Court rebuffed the argument that common-law damages actions do not impose "requirement[s] or prohibition[s]" and that Congress intended only to trump "state statute[s], injunction[s], or executive pronouncement[s]." The Court declared that such a position "is at odds both with the plain words" of the statute and "with the general understanding of common law actions." *Id.* The Court explained that the term "requirements" in the 1969 Cigarette Act's preemption provision "sweeps broadly" and "easily encompass[es] obligations that take the form of common-law rules." *Id.*

A contrary holding would have anomalous consequences, as noted by Justice Breyer in *Medtronic v. Lohr*, 518 U.S. 470, 504-05 (1996) (concurring in part and concurring in the judgment):

> Imagine that, in respect to a particular hearing aid component, a federal MDA regulation requires a 2-inch wire, but a state agency regulation requires a 1-inch wire. If the federal law, embodied in the "2-inch" MDA regulation, preempts the state "1-inch" agency regulation, why would it not similarly pre-empt a state-law tort action that premised liability upon the defendant manufacturer's failure to use a 1-inch wire (say, an award by a jury persuaded by expert testimony that use of more than 1-inch wire is negligent)? The effects of the state agency regulation and

> the state tort suit are identical. *To distinguish between them for pre-emption purposes would grant greater power (to set state standards "different from, or in addition to," federal standards) to a single state jury than to state officials acting through state administrative or legislative lawmaking processes.*

Id. at 504 (emphasis added). This allocation of power is not only arbitrary, it is fundamentally counterintuitive. It forbids statewide pesticide regulation by a state legislature or executive agency, with all their technical expertise, public policy considerations, and democratic controls, but permits *de facto* coercive pesticide regulation by a single jury, which has no inherent expertise on the topic and is provided only with the facts in a single, unique case.

As the Court observed in *Cipollone*, an award of damages can be "a potent method of governing conduct and controlling policy." 505 U.S. at 521 (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247). The Court further observed that "common-law actions of the sort raised by petitioner are premised on the existence of a legal duty, and it is difficult to say that such actions do not impose "requirements or prohibitions." *Id.* at 522 (citing W. Prosser, Law of Torts 4 (4th ed. 1971) and Black's Law Dictionary 1489 (6th ed. 1990)). The Court, in determining the scope of preemption under the 1969 Cigarette Act, therefore did not rely on any fictional distinctions between positive and common law, between acts and omissions, or even between intentional and unintentional torts. *Id.* at 523. Rather, the Court stated that the "central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common-law damages action constitutes a

'requirement or prohibition based on smoking and health. . . imposed under State law with respect to . . . advertising or promotion. . . .'" *Id.* at 523-24.

The word "requirements" in the 1969 Cigarette Act is, of course, also the operative term in FIFRA's labeling preemption clause, and nothing in the language of FIFRA suggests that Congress intended the term to mean anything different here. The lower courts have found little logic in the argument that the term in FIFRA differs in any substantive way from the identical term in the 1969 Cigarette Act. *See, e.g.*, *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1025 (5th Cir. 1994) ("We think this argument is sophistry."); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 371 (7th Cir. 1993) ("[n]ot even the most dedicated hair-splitter could distinguish" the preemption clause of FIFRA from that interpreted in *Cipollone*); *Worm v. American Cyanamid Co.*, 5 F.3d 744, 748 (4th Cir. 1993) ("Any distinction between the two [common law and positive enactment] is 'illusory.'").[4]

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[4] Petitioners' argument that state law actions for damages do not impose "requirements" within the meaning of FIFRA's express preemption clause harks back to the faulty and almost universally rejected reasoning of the pre-*Cipollone* decision employed in *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir. 1984) (holding state tort suits based on inadequate labeling are not "requirements" preempted under § 136v(b)). The District of Columbia Circuit has since recognized that *Cipollone* repudiated *Ferebee's* central premise. *Waterview Management Co. v. F.D.I.C.*, 105 F.3d 696, 699 (D.C. Cir. 1997) (*Cipollone* "explain[ed] that damages actions can be used to enforce state regulations as effectively as other forms of preventive relief and thus damage actions must be preempted where positive enactments are preempted. . . .").

Even assuming *arguendo* that Petitioners' proposed distinction was logically tenable *and* that *Cipollone* had not foreclosed it, however, the bright line that Petitioners propose simply cannot be drawn. There is no clear distinction between prospective and retrospective regulation; there is instead a broad continuum of state actions that look forward and backward in different degrees. As Justice Scalia notes in *Cipollone*, "the problem is not simply the common law: Requirements could be imposed by state executive agencies as well, so long as they were operating under a *general* statute authorizing their supervision of 'commercial advertising' or 'unfair trade practices.' New Jersey and many other States have such statutes on the books." 505 U.S. at 553-54 (J. Scalia, concurring in part, and dissenting in part) (emphasis in original).

Even in the traditionally common law context of product liability claims alleging personal injury or property damage, like those involved here, states have taken different routes. Some have taken purely "retrospective" approaches to governing manufacturer conduct through common law theories of negligence and strict liability. *See, e.g., In re Shigellosis Litigation*, 647 N.W.2d 1, 11 (Minn. 2002); *Hagen v. TEXACO Refining & Marketing, Inc.*, 526 N.W.2d 531, 537 (Iowa 1999). Others have combined these common law causes of action into a single strict liability cause of action, either legislatively, *e.g.*, O.C.G.A. § 51-1-11; Connecticut Products Liability Act, Conn. Gen. Stat. §§ 52-572m—52-572q (2004), or judicially, *e.g.*, *Casrell v. Altec Indus.*, 335 So.2d 128, 132 (Ala. 1976).

Petitioners' attempted distinction breaks down further when pushed beyond the field of products liability. Most states have adopted consumer protection statutes directed at misleading commercial practices, and plaintiffs have increasingly invoked such statutes in asserting pesticide-

related claims. Indeed, Petitioners' claims in the present case include a claim under the Texas Deceptive Trade Practices Act. *See* Petitioners' Br. at 12-13.

These consumer fraud statutes blend prospective and retrospective regulation in a manner that defies the rigid lines that Petitioners ask the Court to draw. For example, the Minnesota Consumer Fraud Act, Minn. Stat. § 325F.68-70, offers a mixed bag of prospective and retrospective regulation. The chapter containing the statute bears the heading "*Prevention* of Consumer Fraud," *see* Minn. Stat. ch. 325F (emphasis added). The statute prospectively prohibits the use of any "misrepresentation" or "misleading statement" in connection with the sale of any merchandise (including, of course, pesticides), and provides avenues for injunctive relief. Minn. Stat. § 325F.70, subd. 1. On the other hand, the statute also provides a retrospective private cause of action similar to a common law claim, permitting consumers to recover damages based on conduct that a jury determines (after the fact) violated the statute. *See* Minn. Stat. § 8.31, subd. 3a.

These "mixed" sources of state action, with both prospective and retrospective elements, are commonplace in the current crop of lawsuits questioning pesticide labeling. Parties have invoked these "mixed" state consumer fraud statutes to ground claims that only a few years ago would have been the sole province of the common law.

BASF's pending petition for *certiorari* aptly illustrates the illusory distinction between prospective and retrospective state action in the supervision of pesticide labeling. In *BASF Corporation* v. *Peterson*, No. 04-81 (petition for cert. filed July 16, 2004), plaintiffs obtained a judgment of more than $52 million in a nationwide class action under the New Jersey Consumer Fraud Act because of perceived flaws in BASF's pesticide labeling. Plaintiffs complained that BASF failed to list on the EPA-approved

labeling of one of its products some of the crops for which EPA had authorized its use, thus preventing the plaintiffs from using it rather than a more expensive pesticide sharing the same active ingredient. 675 N.W.2d 57, 62 (Minn. 2004). From the Petitioners' perspective, the damages the *Peterson* plaintiffs sought were clearly "retrospective." But the coercive *prospective* effect of such a judgment could not be more clear: plaintiffs wanted a change in the label. Moreover, the change required by the judgment is flatly inconsistent with EPA's labeling regulations, which expressly grant manufacturers the flexibility to omit federally-registered uses from final product labeling.

Although the judgment in *Peterson* plainly imposed labeling requirements that are inconsistent with FIFRA and its regulations, the Minnesota Supreme Court ruled against preemption—in conflict with the decision below—on the basis that the plaintiffs relied on evidence of conduct and statements, such as BASF's advertising, that (although completely consistent with the label) "went beyond the label." 657 N.W.2d at 70. The overly narrow view of FIFRA preemption adopted by the state court in *Peterson* demonstrates the need for *this* Court to make a strong statement favoring *broad* preemption under FIFRA, rather than to adopt the restrictive view of Section 136v(b) for which the Petitioners argue.

Indeed, because the number and diversity of state statutes, regulations, common law actions, and executive directives potentially applicable to pesticide labeling has grown enormously in recent years, EPA's authority over pesticide labeling faces an increasing threat. Moreover, as this Court has recognized, states not only may regulate pesticides themselves, they may redelegate that authority to local authorities. *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597 607-08, 612 (1991). Given such redelegation, a

wide variety of different types of regulation is not only possible but likely, and the question of preemption may arise from any one of them. In the face of that variety, any preemption jurisprudence that relies solely on a determination of prospective or retrospective effect will be hopelessly prolix and inherently unpredictable. The only rational and consistent approach to this question is the approach dictated by the language of the statute and adopted by the Fifth Circuit here: does the state action, whatever its character, impose a labeling requirement in addition to or different from that imposed by federal law?

II. THE REALITY OF FIFRA PREEMPTION GOES FAR BEYOND REGULATIONS AND COMMON LAW ACTIONS FOR DAMAGES.

In addition to positing an unrealistic distinction between prospective and retrospective state actions, Petitioners also fail to recognize the broad diversity of legal theories that courts and parties have sought to apply to issues involving pesticide labeling. By assuming *sub silentio* that the world of FIFRA preemption encompasses only state regulations and common law damage actions, Petitioners ignore the majority of the preemption issues that courts around the country actually deal with every day in pesticide cases. Adopting Petitioners' superficial bright line test would effectively turn the preemption issue in these varied cases from an examination of the substance of the claim into a mere pleading game.

Litigants routinely ask state courts to take a wide variety of state actions that affect or threaten to affect the existence, form, and content of pesticide labels. Petitioners' limited argument fails to adequately address or even acknowledge many of these. For example:

Negligent testing. One of the most common forms of state action regarding pesticide labels arises from a claim of

"negligent testing." *See, e.g., Taylor Ag. Indus. v. Pure-Gro*, 54 F.3d 555, 562 (9th Cir. 1995). Petitioners here even call their own claim "a classic case of inadequate testing," Pet. Br. at 44, but nevertheless never come to grips with the problem fundamental to such claims: they are generally premised on allegedly inadequate product labels. Plaintiffs may contend that a manufacturer should have done additional testing, but the claim often depends on the additional allegation that, if such testing had been done, the defendants would or should have placed additional or different warnings on the label. *See Dahlman Farms, Inc. v. FMC Corp.*, 240 F. Supp.2d 1012, 1019 (D. Minn. 2004) ("although couched in terms of negligent testing, [plaintiff's] first claim is premised on inadequate labeling, and it is therefore preempted by the FIFRA.").

Common law design defect. Plaintiffs also frequently invoke state court action against pesticide labels through claims based on "design defects." The substance of such a claim, however, often is not what the pesticide was or was not designed to do, but what the pesticide label said about the crops for which the pesticide was suitable, how the pesticide was to be applied, and the like. *See, e.g., Grenier v. Vermont Log Buildings, Inc.*, 96 F.3d 559, 564 (1st Cir. 1996); *Hopkins v. American Cyanamid*, 666 So.2d 615 (La. 1996). *See also Brierton v. Vermont Log Buildings, Inc.*, 1998 WL 611447, *3-4 (N.D. Ill Sept. 8, 1998) (holding that plaintiffs' claims for negligent or defective manufacture were in fact disguised labeling claims, and thus preempted).

Consumer fraud claims—sales of pesticides. Courts and plaintiffs have also employed state action through state consumer fraud statutes, premising claims on a manufacturer's alleged deceptive misrepresentations and/or omissions related to the safety of the pesticide. *See, e.g. Mortellite v. Novartis Crop Protection, Inc.*, 278 F. Supp.2d

390 (D. N.J. 2003) (alleging breach of the New Jersey Consumer Fraud Act for manufacturer's alleged deceptive representation that its product was safe to use as an insecticide on blueberry plants); *Anderson v. Dow Agrosciences, LLC*, 262 F. Supp.2d 1280, 1289 (W.D. Okla. 2003); *Dahlman Farms, Inc. v. FMC Corp.*, 240 F. Supp.2d 1012, 1020 (D. Minn. 2002). Again, although clad in the guise of consumer protection, these claims can directly question the federally approved pesticide labels.

Consumer fraud claims—failure to sell pesticide. Other plaintiffs have invoked a state consumer fraud statute against pesticide labeling in just the opposite way, to try to *force* a manufacturer to label a pesticide for a particular use against its will. In *Peterson v. BASF Corp.*, 675 N.W.2d 57 (Minn. 2004), *petition for cert. pending* (No. 04-81), the state courts sustained a claim based on the theory that BASF's pesticide labeling—EPA approved and fully compliant with FIFRA—implemented an unconscionable commercial practice.

In many ways, that Minnesota proceeding represents both the most alarming and at the same time most insidious type of state action against pesticide labels. The state court's action held in effect that BASF should not have labeled and advertised two products with the same active ingredient with different product names for different approved uses, even though EPA regulations (1) required BASF to give the two pesticides different names and labels based on the products' different chemical formulas, (2) explicitly allowed BASF to market the products with a subset of the EPA-approved uses on the label, and (3) strictly prohibited BASF from promoting any off-label use of its pesticides in its advertising. Such *ad hoc* regulation of pesticide labeling through state law-based jury verdicts necessarily erodes EPA's exclusive authority to regulate the content of pesticide labels. Yet, as discussed

above, the Minnesota Supreme Court ruled against preemption because the plaintiffs relied on evidence that, even though entirely consistent with the label, "went beyond the label." 657 N.W.2d at 70.

The *Peterson* case is not a mere flash in the pan; the attorney who brought the case has stated publicly that, because many manufacturers sell different pesticides with the same active ingredient, the premise of the case applies to "the entire industry."[5] To guard against an exponential increase in litigation attacking pesticide labeling, this Court should decisively affirm the Fifth Circuit's reasoning that FIFRA preempts state-law claims of *any* kind that attack pesticide labeling, even if the plaintiffs rely in part on advertisements and off-label statements, as long as the defendant could avoid liability by changing its labeling. This would help ensure that plaintiffs cannot circumvent FIFRA preemption by creative pleading—as the plaintiffs in *Peterson* have, so far, successfully done.

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[5] *E.g.*, *Minnesota High Court Approves $56 Million to U.S. Farmers in Fraud Suit*, CropChoice News (Feb. 22, 2004), *available at* http://www.cropchoice.com/leadstry5cbb.html?recid=2402; *Minnesota Appellate Court Approves $53 Million to U.S. Farmers in Consumer Fraud Class Action Against BASF*, The Soy Daily (Nov. 16, 2004), *available at* http://www.thesoydailyclub.com/Farm&Market/basf031420003.asp; PR Newswire, *Minnesota Supreme Court Approves $56 Million to U.S. Farmers in National Consumer Fraud Class Action*, L.A. Times (Feb. 19, 2004), *available at* http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=LATAGR.story&STORY=/www/story/02-19-2004/0002113056&EDATE=THU+Feb+19+2004,+03:21+PM.

State Court Injunctive Relief. Other litigants have asked courts to take direct state action imposing requirements on pesticide labels through the courts' injunctive powers. For example, in *Williams v. Dow Chemical Co.*, 255 F. Supp.2d 219, 231 (S.D.N.Y. 2003), the plaintiffs sought a permanent injunction requiring (1) implementation of a notice program to alert the public about risks of the pesticide and (2) implementation of appropriate labeling requirements on pesticide products advising the public of potential health risks.

Fraud on the Agency. Under this theory, a plaintiff asserts a common law claim that a defendant tortiously misled a federal agency into taking a particular action, such as approving a product or a label. In other words, the plaintiff asks the state to take action to effectively "correct" a mistake by the federal agency. A plaintiff may also assert that a defendant has "abused" federal regulations and that the regulations therefore lack any preemptive effect. This Court has already rejected one form of fraud-on-the-agency claim in *Buckman v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001) (finding MDA preempts claim that defendant misled FDA into designating one medical device as substantial equivalent of another),[6] but adoption of Petitioners' bright-line rule for

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[6] The Ninth Circuit has since extended the *Buckman* rationale to the context of FIFRA preemption. *See Nathan Kimmel, Inc. v. Dow Elanco*, 275 F.3d 1199, 1205 (9th Cir. 2002). (holding plaintiffs' claims, based on an allegation that defendant knowingly submitted false information to EPA to obtain an amended pesticide label, were preempted by FIFRA).

which plaintiffs argue would encourage parties to creatively replead the same substance in an effort to avoid the *Buckman* holding.

Claims to Cancel Registration. Litigants have asked courts to take state action against a pesticide label by effectively canceling the pesticide's federal registration. For example, in *Hardin v. BASF Corp.*, 290 F. Supp.2d 964 (E.D. Ark. 2003), the plaintiffs brought strict liability and negligence claims against the manufacturer of an herbicide that allegedly drifted over from nearby rice fields to plaintiffs' tomato fields. Despite resting their claim on the claimed inadequacy of the pesticide label's application instructions, *id.* at 970, plaintiffs argued that FIFRA preemption did not apply because, *inter alia*, (1) EPA had no authority to grant conditional registration for the herbicide; and (2) EPA registered the herbicide only because of political pressure. *Id.* at 972. As the district court noted, the argument asked the court to apply state law "to second guess the EPA's decision to grant BASF's application for registration of [the herbicide]." *Id.* (citations omitted). *See also Kuiper v. American Cyanamid Co.*, 131 F.3d 656, 666 (7th Cir. 1997) ("FIFRA does not allow states to second-guess EPA's labeling decisions under the guise of enforcing the requirements of FIFRA itself.")

State RICO Claims. Plaintiffs have even tried to invoke state RICO claims to prompt state action on pesticide labeling. *See Palmas y Bambu, S.A. v. E.I. du Pont de Nemours & Co.*, 881 So.2d 565 (Fla. Ct. App. 2004); *Williams v. Dow Chemical Co.*, 255 F. Supp.2d 219 (S.D.N.Y. 2003). As with the attempts at state action described above, such a RICO attack that tries to reach pesticide labels plainly implicates FIFRA preemption. As one federal court noted in addressing an analogous federal RICO claim:

> Recognition of a RICO cause of action premised on allegations that a pesticide manufacturer intentionally misrepresented or failed to disclose pertinent information concerning its product would obviously undermine the regulatory structure constructed by Congress. This would not only be inimical to the express congressional goal of uniformity in the regulation and sale of pesticides, but to allow a plaintiff to use RICO in such fashion would be to condone direct circumvention of the EPA's regulatory authority for the accomplishment of an end otherwise prohibited by Congress.

Jarman v. United Indus. Corp., 98 F. Supp.2d 757, 766 (S.D. Miss. 2000).

Other Types of State Action. Although the examples listed above are perhaps the most prominent types of state action that raise FIFRA preemption issues, the list does not stop there. Other theories plaintiffs have used or could use to invoke state action concerning federally approved pesticide labels include implied warranty of merchantability and fitness for a particular purpose, *e.g.*, *Papas v. Upjohn Co.*, 985 F.2d 516, 517 (11th Cir.), *cert. denied*, 510 U.S. 913 (1993), express warranties based on label statements, *e.g.*, *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69 (8th Cir. 1995), negligent distribution, *e.g.*, *E.I. du Pont de Nemours & Co. v. Aquamar S.A.*, 881 So.2d 1 (Fla. Ct. App. 2004), and fraud on the market, *e.g.*, *Varacallo v. Massachusetts Mut. Life Ins. Co.*, 752 A.2d 807 (N.J. Super App. Civ. 2000).

In sum, this complex, subtle and varied mix of possible state statutory and common law actions belies Petitioners' implication that the world of FIFRA preemption is limited to state administrative regulations and common law

product-liability action. The crude, black-and-white classification that Petitioners propose would elevate the form of a state action above its substance, and would undermine EPA's exclusive jurisdiction over pesticide labeling. Any standard for analyzing whether FIFRA preempts a particular state action must focus on the substance of the claim and ask: does the state action, whatever its form, impose a labeling requirement in addition to or different from that imposed by federal law?

CONCLUSION

The court of appeals' opinion below, consistent with the largely uniform rulings of other federal courts of appeals and state courts of last resort, properly recognized that FIFRA preempts any state law cause of action that would subject a pesticide to "any requirements for labeling" that are "in addition to or different from" the FIFRA-required label. 7 U.S.C. § 136v(b). For all the reasons outlined above, this Court should affirm, making clear in its ruling that FIFRA preempts not only failure-to-warn claims, but also the wide variety of other state-law claims—such as the claims in the *Peterson* case—that attack pesticide labeling.

Respectfully Submitted,

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